8-3100-9128-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Lloyd E. Olson,
Petitioner,

v.

City of Glyndon,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:45 a.m. on December 13, 1994 at the Clay County Courthouse in Moorhead, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated September 26, 1994. The record closed on February 6, 1995, when the last brief was filed.

Zenas Baer, Attorney at Law, P.O. Box 249, 331 6th Street, Hawley, Minnesota 56549, appeared on behalf of the Petitioner, Lloyd Olson. Barry P. Hogan; Jefferies, Olson, Flom, Oppegard & Hogan, Attorneys at Law, P.O. Box 9, Moorhead, Minnesota 56561-0009, appeared on behalf of the City of Glyndon (Respondent or City).

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the . Exceptions to this Report, if any, shall be filed with the Bernie Melter, Minnesota Department of Veterans Affairs, 20 West 12th Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue in this case is whether the Petitioner was entitled to notice of his right to a veterans preference hearing under Minn. Stat. § 197.46 (1992) before he agreed, in writing, to resign his employment in return for payment of one-half year's wages.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is an honorably discharged veteran of the United States Army. He was on active duty from July 7, 1958 through April 6, 1961.

2. On or about April 16, 1979, Petitioner began working for the City of Glyndon as a maintenance worker on a full-time basis.

3. As a maintenance worker, Petitioner was generally responsible for the plowing, care, and maintenance of city streets; operating the City's sewer and water systems; maintaining a park and community center; and maintaining municipal equipment. In the summer months, Petitioner sometimes had assistance from temporary employees who worked for the City under the Rural Minnesota CEP program.

4. Petitioner is licensed by the Department of Health as Water Supply System Operator, Class C, and certified by the Minnesota Pollution Control Agency (MPCA) as a Wastewater Treatment Facility Operator. Exs. 21, 22. During the course of his employment he was generally responsible for the City's water and waste treatment systems. His duties involved keeping wellhouse equipment clean and operational, filing sewer test results and reports with the MPCA, filing water test results and reports with the Minnesota Department of Health (MDH), monitoring the water tower recirculating system, and flushing hydrants on dead-end lines. Also, with MPCA approval, he was responsible for dumping sewage overflow from the City's lagoon (ponds) when needed. Ex. 12.

5. Throughout his employment, Petitioner was supervised by two city council members who constituted the so-called maintenance committee. One of them was Petitioner's designated "contact person." The mayor sat in on committee meetings to ensure a quorum which would ostensibly allow the committee to take formal action at committee meetings. Exs. 3-12.

6. Petitioner generally worked under annual employment contracts with the City. Exs. 3-12. The contracts set forth his duties, compensation and benefits. The contracts also contained "due process procedures" governing disciplinary action.

7. Prior to 1982, Petitioner's job performance apparently was acceptable to the council members on the maintenance committee as well as other city council members. In August 1982, however, the city council placed Petitioner on four-month's probation. The probationary period ran from September 1 through December 31, 1982. The city council's action was based on a variety of dissatisfactions with Petitioner's job performance. Among other things, the council was dissatisfied with the cleanliness and maintenance of the park, fire hall and city shed; excessively long breaks; hiring too much outside help; infrequent street cleaning; untimely care of the community center; and incomplete timecards. Ex. 27. The council members' general feeling was that Petitioner simply wasn't getting his work done because he was lazy and lacked motivation. They felt that he wasted too much time on the job and contracted out work he should have performed himself. Petitioner believed that he simply had too much work to perform in a timely and satisfactory manner.

8. Petitioner completed his probationary period. However, the council's dissatisfaction with his job performance continued throughout the remainder of his employment. From time to time these dissatisfactions were reviewed with him, but few records were kept regarding the council member's discussions and verbal warnings. On December 30, 1986, the city council expressed dissatisfactions with Petitioner's maintenance of the community hall. At that time, the council told him he should take better care of it and take fewer coffee breaks. Ex. 28. On February 4, 1989, the fire chief complained that the Petitioner wasn't clearing snow around fire hydrants or around the fire exit doors of the community center. Ex. 29.

9. The City had a number of ongoing problems relating to its water and sewer systems. The sewer problems were due to the inadequate size and age of its lagoon and Petitioner's failure to make proper reports to the MPCA.

10. On August 8, 1984, the City's municipal wastewater treatment facility was inspected by MPCA. The inspector found, among other things, that monthly discharge monitoring reports had not been properly completed and that the operator's filing system was disorganized and should be improved. Ex. 31.

11. On June 19, 1986, the MPCA completed another compliance monitoring survey of the City's facility. Among other things, the surveyor found that the operator (Petitioner) had failed to properly monitor influent flow. Ex. 31.

12. On December 2, 1991, the City received a Notice of Violation from the MPCA. Among other things, the MPCA found that the facility had made excessive discharges of effluents, discharges without prior MPCA approval, and effluent discharges from an unauthorized discharge point. It also found that Petitioner had failed to report effluent flow data on monthly forms. The Petitioner had failed to sample discharges because he believed many of them would not meet standards. He decided not to monitor those discharges in order to save sampling costs. As a result of Petitioner's actions, the City was assessed and paid a $2700 penalty. That was in addition to penalties for other violations which were not attributable to Petitioner.

13. Prior to 1988, Petitioner suffered from sleep apnea, and he commonly fell asleep on the job. Following an accident in 1988, Petitioner was instructed to seek treatment and he did. The medical treatment he received at that time corrected the problem. However, even after Petitioner was successfully treated for sleep apnea, the city council had dissatisfactions with Petitioner's job performance. On March 14, 1990, the council met to consider his work performance. At that time, Petitioner was presented with the identical list of dissatisfactions he had been given in 1982. Ex. 30. At the meeting, the council decided to pay Petitioner an hourly rate rather than a set salary and eliminated his ability to use compensatory time, choosing instead to pay him for all time worked. At the meeting, the council also hired a part-time maintenance person, Aldwin Anderson, to work 30 hours weekly. In connection with Anderson's hiring, Petitioner agreed that his regular work week would be reduced to 30 hours to help cover the costs of hiring Anderson.

14. The employment changes made at the Council's meeting on March 14, 1990, were included in the new annual employment contract. Ex. 10. Thereafter, in subsequent years, Petitioner refused to sign his annual employment contract on the grounds that he couldn't perform all the duties assigned to him.

15. Although Petitioner's regular workweek was reduced to 30 hours in 1990, he was expected to perform his duties and work as many hours as needed to complete them. Nonetheless, many of his duties were not performed timely, and Petitioner continued to take excessively long breaks, make unnecessary trips to Moorhead, and generally waste time visiting. On occasion, the mayor even found him sleeping on the job.

16. On November 23, 1993, Petitioner had carpal tunnel surgery on his right hand. While off work, a city council member, Maurice ("Bud") Anstadt was hired to work for him. On

December 6, 1993, Petitioner returned to work on a reduced schedule because he was still healing and unable to perform all his usual job duties. While Anstadt was filling in for Petitioner, he discovered that pumps in the wellhouse had not been repaired and that records had not been kept. Furthermore, in early January, 1994, Anstadt discovered that Petitioner had not been following the service manual instructions for the City's two-year-old $60,000 tractor. Petitioner was unable to locate the service manual and told Anstadt that he changed the oil whenever he thought it was needed. However, no service records had been kept. On or about February 10, 1994, Anstadt reported to the Mayor, John Butze, that the City's tractor still had its original window stickers and its original oil filter. Butze understood that the oil had never been changed and considered Petitioner's failure to change the oil or remove the window stickers to be the "last straw." A few weeks earlier, Petitioner had a loud argument with Butze at the community center when Butze questioned him about the cleanliness of municipal vehicles.

17. Butze had been dissatisfied with Petitioner's job performance ever since he became Mayor in 1988. He had received frequent complaints—from daily to weekly—about Petitioner's job performance since that time. When Butze confronted the Petitioner with the complaints or verbally reprimanded him, Petitioner sometimes cried and sometimes became disrespectful. Petitioner's job performance was an issue at every monthly council meeting. When Butze confronted Petitioner with complaints he had received, Petitioner corrected them if he felt they were warranted.

18. When it was learned that Petitioner was not regularly changing the oil on the City's new tractor, Butze, Anstadt and Dick Jones decided that they should meet with Petitioner to discuss their concerns with his job performance. Anstadt and Jones were maintenance committee members at that time. Before the meeting, Butze asked the city clerk, Dennis Johnson, to prepare figures showing the amounts Petitioner would receive if paid his usual wage for a one-year period working 20, 30, or 40 hours weekly. The figures were prepared to determine the City's costs if Petitioner chose to resign from his job. Butze hoped that he would.

19. At approximately 3 p.m. on January 10, Butze, Anstadt, and Jones met with Petitioner at the city hall. At the meeting, Butze told Petitioner that the Council was dissatisfied with his work performance and asked Petitioner what steps could be taken to improve it. Petitioner acknowledged that there was a problem but told them that he didn't have enough time to perform all his duties and couldn't do the work any longer. At that time, he began crying. Butze then proposed that Petitioner resign his position in return for a payment of his usual hourly wage at 20 hours weekly for one year, being $10,930. Petitioner was pleased with the offer. He said it was more than he deserved, and he agreed to accept it. He was told to work with the city attorney on the language of the agreement and decide if he wanted his wage payments paid over time or in a lump sum. It was agreed, as Petitioner suggested, that the City would make PERA contributions on the wage payments made to him.

20. Prior to the time of the meeting on January 10, neither the mayor nor the maintenance committee members had decided that Petitioner should be discharged from his employment. They were dissatisfied with his job performance, and had decided to request his resignation, but they had not decided what steps would be taken, if any, in the event that Petitioner chose not to resign. During that meeting, the Petitioner's right to a hearing under the Veterans Preference Act in the event he was discharged was not discussed. Also, there was no discussion of discharge.

21. On October 12, 1992, the city council held its regular monthly meeting. At that time, it accepted Petitioner's resignation pursuant to the verbal agreement reached at the January 10 meeting with the maintenance committee and the Mayor.

22. On or about January 13, 1994, Petitioner picked up a draft copy of a proposed termination agreement at the city attorney's office. After that, he was given the opportunity to review the agreement and make changes to it. He consulted legal counsel in Moorhead, who made language suggestions the City accepted. One requested change was that the agreement specifically state that Petitioner would not help in train his successor. Another was that the written agreement specifically state that the council requested his resignation because he was no longer able to perform his duties due to his carpal tunnel surgery.

23. The employment termination agreement drafted by the City's attorney contained a provision stating that Petitioner was waiving his rights to unemployment compensation. When Petitioner had his attorney review the agreement, he was informed that the waiver of his entitlement to unemployment compensation benefits was illegal.[1] Petitioner did not inform the City that the waiver was void before he signed the employment termination agreement.

24. Petitioner signed the employment termination agreement on or about February 2, 1994. At his request, he was paid a lump sum payment of $10,930, less applicable tax deductions. Petitioner subsequently filed for unemployment insurance benefits. He was paid $5,850 in unemployment compensation benefits after his claim was filed. They were rebilled to the City of Glyndon.[2]

25. On September 6, 1994, shortly after his unemployment insurance benefits expired, Petitioner filed a petition with the Commissioner of the Minnesota Department of Veterans Affairs. In his petition he stated that he was forced to resign his employment with the City and had not been given notice of his right to a hearing in violation of Minn. Stat. § 197.46 (1992).

26. Petitioner's decision to terminate his employment with the City in return for payment of the equivalent of one-half year's wages was voluntarily made. Petitioner was not threatened with discharge if he did not resign and neither the mayor nor any city council members had decided that he would be discharged if he refused the City's offer. In fact, council members would have considered other alternatives and were willing to give Petitioner another chance.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have authority to determine if the Petitioner was removed from his employment without notice of his right to a hearing under the Veterans Preference Act pursuant to Minn. Stat. §§ 197.481 and 14.50 (1992).

2. The Department complied with all relevant substantive and procedural requirements of statute and rule.

3. Respondent received timely and proper notice of the hearing and the claims asserted by Petitioner.

4. Petitioner is an honorably discharged veteran for purposes of Minn. Stat. §§ 197.447 and 197.46 (1992).

5. Under Minn. Rules pt. 1400.7300, subp. 5 (1993), Petitioner has the burden of proof to establish that he was removed from his employment in violation of Minn. Stat. § 197.46.

6. As a general rule, resignations are presumed to be voluntary. Christie v. United States, 518 F.2d 584, 587, 207, Ct. Cl. 333 (1975).

7. A voluntary resignation does not constitute a removal for purposes of Minn. Stat. § 197.46 (1982). Byrne v. City of St. Paul, 137 Minn. 235, 163 N.W. 162 (1917); Frain v. City of St. Paul, 112 N.W.2d 795, 797-98 (Minn. 1962); Christie v. United States, 518 F.2d 584, 588, 207 Ct. Cl. 333 (1975).

8. When a veteran alleges that his resignation was involuntary, the veteran has the burden of showing that he agreed to resign under duress brought on by governmental action. Christie v. United States, 518 F.2d 584, 588, 207 Ct. Cl. 333, 338 (1975).

9. The mere threat of dismissal, if made in good faith, does not constitute duress. Morrell v. Stone, 638 F.Supp. 163, 167 (W.D. Va. 1986); Christie v. United States, 518 F.2d 584, 587-88, 207 Ct. Cl. 333 (1975); Jurgenson v. Fairfax County Va., 745 F.2d 868, 889-90 (4th Cir. 1984).

10. The good cause requirement is met if the veteran fails to show that the City knew or believed that the discharge could not be substantiated. Christie v. United States, 518 F.2d 584, 588, 207 Ct. Cl. 333 (1975).

11. To establish that a resignation was involuntary, the veteran must show that there was deception, coercion, duress, time pressure or intimidation. Christie v. United States, 518 F.2d 584, 588, 207 Ct. Cl. 333 (1975); Taylor v. United States, 591 F.2d 688, 692 (Ct. Cl. 1979); Byrne v. City of St. Paul, 137 Minn. 235, 163 N.W. 162 (1917).

12. Petitioner's alleged lack of knowledge of his right to a hearing under Minn. Stat. § 197.46 does not render his resignation involuntary because he was never threatened with discharge, his rights in the event he was discharged were not raised during discussions with the mayor or city council members, and Petitioner was given the opportunity to, and did, in fact, consult with legal counsel concerning his rights prior to executing the employment termination agreement. Cf. Taylor v. United States, 591 F.2d 688, 692 (Ct. Cl. 1979).

13. The test for determining whether a resignation was made under duress is: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that the circumstances were the result of coercive acts of the opposite party. Christie v. United States, 518 F.2d 584, 587, 207 Ct. Cl. 333 (1975); Schultz v. United States Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987).

14. Because Petitioner voluntarily resigned his employment, he had no right to a hearing under Minn. Stat. § 197.46 and the City, which had never decided to remove him and which had never threatened him with removal, was not required to give him notice of his right to a hearing under the statute. Cf., Frain v. City of St. Paul, 112 N.W.2d 795, 797-98 (Minn. 1962).

15. The decision granting Petitioner unemployment insurance benefits, which apparently was based on a finding that his resignation was involuntary, cannot and should not be given any weight in this proceeding. Evans v. Ford Motor Co., 784 F.Supp. 618, 620 (D.Minn. 1991)

citing Clapper v. Budget Oil Co., 437 N.W.2d 722 (Minn. Ct. App. 1989), pet for rev. den, June 9, 1989.

16. Petitioner failed to establish that his resignation was involuntary, that the city council members knew or believed that grounds for discharging him could not be substantiated had they decided to discharge him, and failed to establish that the City violated Minn. Stat. § 197.46.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED: That the Commissioner of the Minnesota Department of Veterans Affairs dismiss the Petitioner's Petition with prejudice.

Dated this 2nd day of March, 1995

JON L. LUNDE
Administrative Law Judge

Reported: Taped, 4 tapes

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

In this proceeding the Petitioner has alleged that the City violated Minn. Stat. § 197.46 by failing to apprise him that he was entitled to a hearing under the statute. The statute, which governs the removal of veterans, states, in part, as follows:

. . . No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

In Petitioner's view, the City violated the state because it failed to give him notice of a right to a hearing when the mayor and city council members allegedly decided that he would be terminated if he didn't quit. That argument is not persuasive and Petitioner's petition should be dismissed.

Petitioner argued that he didn't voluntary waive his right to a hearing under Minn. Stat. § 197.46 because he was never informed of his right to a hearing under the statute. The statute requires a city notifying a veteran of its "intent" to discharge him, to give the veteran notice of his right to a hearing. Because the word "intent" is used in the statute, Petitioner argues that the hearing notice must be given as soon as city officials decided that he was going to be discharged if he didn't resign. Furthermore, Petitioner argues that when the City's officials discussed his termination with him they were required to inform him of his rights under the statute even though they offered him the option of resigning.

In support of his arguments, Petitioner relies on an administrative law judge's report in Johnson v. County of Anoka, 69-3100-8501-2, reported on July 22, 1994 in Finance and Commerce. In that case, an employee was given the option of resigning or being discharged. He was given one day to decide. He was never informed that before he could be discharged he had a right to a hearing at which time the county would have to show, by a preponderance of the evidence, that the veteran had engaged in misconduct. The administrative law judge concluded that the employee was entitled to notice of his hearing rights when the decision to remove him was made. Because the veteran was not given notice of his right to a hearing, the administrative law judge held that the employer violated Minn. Stat. § 197.46. He stated:

. . . In this case, the decision had been made [to discharge Johnson]. Johnson was not given any alternative to removal from his position. His choice was to resign or be fired. Anoka County made that decision before Johnson resigned and there is no indication that Anoka County's decision was in any way conditional. Johnson reasonably believed that the decision was final and would not be altered. He was unaware of any hearing right and the fact that Anoka County would bear the burden of proof to demonstrate incompetence or misconduct. Having deciding [sic] to terminate him, Anoka County was obliged to inform Johnson of his rights when offering him the option of resigning. Any less vitiates the effectiveness of the Veterans Preference Act and could, as here, deny the veteran any opportunity to make a knowing decision on whether to demand a hearing or resign and waive his rights.

Resignations obtained by agency misinformation or deception are generally considered involuntary. Covington v. Department of Health and Human Services, 750 F.2d 937, 942 (Fed. Cir. 1984). It probably follows that a veteran who isn't advised of his right to a hearing when confronted with the choice of resigning or being discharged cannot be said to have voluntarily resigned because the veterans lack of knowledge gives him no alternative to resignation. Covington, supra, at 943. Erroneously telling a veteran that he has no hearing rights is not, in substance, different from failing to advise the employee that he has a hearing right.

However, the Johnson case is inapplicable here. In this proceeding, neither the maintenance committee, the mayor, nor the council had decided to discharge Petitioner if he didn't resign, and Petitioner was never told he would be discharged if he didn't. Petitioner testified that either Butze or Anstadt told him that he was going to be terminated. However, that testimony was inconsistent with later testimony that no one told him "in so many words" that he would be terminated if he didn't quit. Also, it wasn't persuasive.

Petitioner may have believed that he would be discharged if he didn't resign. However, in determining whether a decision is voluntary or made under duress, an objective test is used.

Duress is not measured by the employee's subjective evaluation of the situation. Christie v. United States, 518 F.2d 584, 587, 207 Ct. Cl. 333 (1975); Chase v. Independent School District No. 31, 1993 W.L. 459883 (Minn. Ct. App. 1993, unpublished). It is possible that the City would have decided to terminate Petitioner's employment had he not accepted the offer made to him. However, the Administrative Law Judge is persuaded that no decision to discharge him or to recommend discharge had been made by the time of the meeting on January 10, 1994. Even the mayor, who was more anxious to have Petitioner resign than city council members, was willing to consider alternatives other than termination if Petitioner had not agreed to resign.

Petitioner also testified that council members told him they couldn't use him anymore because of his carpal tunnel surgery. That testimony also isn't credible. Although the employment termination agreement contains a recital stating that the City requested Petitioner's resignation because his carpal tunnel surgery made him unable to perform his job, the evidence shows that the mayor and council members sought his resignation because they were dissatisfied with the Petitioner's job performance. None of them expressed reservations about his ability to work once he had recovered from carpal tunnel surgery. Council members agreed to cooperate with Petitioner in the event he sought disability benefits, but they didn't mention his surgery when they discussed his unsatisfactory job performance and never told him they were requesting his resignation only because of his surgery. In fact, Petitioner's inability to fully perform his job duties wasn't an issue of any significance until Petitioner had it inserted into the employment termination agreement. (Compare Ex. 15 and 33).

Based upon all the evidence, the Administrative Law Judge is persuaded that Petitioner was not threatened with discharge if he didn't resign and was not told his services were no longer needed due to his carpal tunnel surgery. The Administrative Law Judge is persuaded, instead, that the Petitioner voluntarily terminated his employment because he recognized that his job performance was unsatisfactory and was willing to resign on the terms suggested by the mayor. He had a choice, he didn't have to accept the City's offer.

Petitioner also argued that he didn't waive his right to a veterans preference hearing by agreeing to terminate his employment. In his view, he couldn't waive his right to a hearing because he was never told he had a right to one. It is true that one cannot waive rights except in a knowing, voluntary manner. However, when Petitioner agreed to resign, he had no hearing right to waive. The right to a hearing does not arise until an employer informs the employee of its intent to discharge him. In this case, the City had never made or communicated such a decision and it wasn't required, therefore, to give him notice of his right to a hearing in the event that it later made a decision to terminate him. Petitioner had ample opportunity investigate his rights and did, in fact, seek legal counsel prior to signing the employment termination agreement.

JLL

[1] Under Minn. Stat. § 268.17, subd. 1 (1992) unemployment compensation benefits cannot be waived.

[2] Under Minn. Stat. § 268.06, subd. 25 (1992) unemployment benefits paid to former employees of political subdivisions like the City the Glyndon are billed directly back to the municipality.